No. 83-1793

In the Supreme Court of the United States

OCTOBER TERM, 1984

JACK C. GIVENS, ET AL., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 3(h)(6) of the Railroad Retirement Act of 1974, which eliminates dual benefits based on a spouse's Social Security employment if neither the Railroad Retirement Board nor a court had determined prior to August 13, 1981 that the individual was entitled to such benefits, violates the Due Process Clause of the Fifth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 720 F.2d 196.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1983, and a petition for rehearing was denied on December 21, 1983 (Pet. App. G1). The petition for a writ of certiorari was filed as of March 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge a decision of the United States Railroad Retirement Board denying them "dual" or "windfall" benefits under Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act of 1974, 45 U.S.C. (Supp. V) 231b(h)(3) and (4), by virture of the operation of Section 3(h)(6) of that Act, 45 U.S.C. (Supp. V) 231b(h)(6).

1. Before 1974, individuals fully insured under the Railroad Retirement program and the Social Security program were entitled to benefits under both. The Railroad Retirement Act of 1974 established a system for phasing out this practice. This Court sustained the constitutionality of the phase-out in *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166 (1980). Under the phase-out scheme, a person is entitled to dual benefits only if he "would have been entitled" to Social Security benefits "under the provisions of the Social Security Act as in effect on December 31, 1974" (45 U.S.C. (Supp. V) 231b(h)(1), (2), (3) and (4)).

This case concerns the entitlement of a retired railroad employee to receive windfall benefits based upon his or her asserted eligibility on December 31, 1974 to receive Social Security benefits as the wife, husband, widow, or widower of a person who was permanently insured under the Social Security Act. See 45 U.S.C. (Supp. V) 231b(h)(3) and (4). Application to these persons of the scheme for phasing out windfall benefits was made more complicated by this Court's decision in *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), which held that the Fifth Amendment was violated by a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouses in order to receive Social Security spousal benefits. Following *Goldfarb,* the Railroad Retirement Board was required to decide whether railroad retirees were entitled to dual benefits if they were not entitled to Social Security benefits under the law as interpreted as of December 31, 1974, but were entitled to such benefits under *Goldfarb*. The Board concluded that such individuals were not entitled to dual benefits. In *Gebbie* v. *United States Railroad Retirement Board,* 631 F.2d 512 (7th Cir. 1980), however, the Seventh Circuit reached the opposite conclusion as a matter of statutory construction (*id.* at 516).

The *Gebbie* court refused to certify that case as a class action (631 F.2d at 516 n.9), and the Board did not thereafter follow the Seventh Circuit's decision in *Gebbie* when considering applications for benefits filed by other retirees. Nevertheless, Congress was concerned about the consequences that would befall the Railroad Retirement system if the interpretation given the Act by the Seventh Circuit in *Gebbie* were broadly applied. Accordingly, in 1981, Congress added a new Section 3(h)(6) to the Railroad Retirement Act (45 U.S.C. (Supp. V) 231b(h)(6)) eliminating the payment of windfall benefits under 45 U.S.C. 231b(h)(3) or (4) to any additional persons based on their spouses' Social Security employment. Section 3(h)(6) bars the payment of benefits under those provisions to any individual "unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."

2. Petitioner Givens, a retired railroad worker, became eligible for an annuity under the Railroad Retirement Act on January 24, 1975, and his wife was insured under the Social Security Act prior to January 1, 1975. On December 11, 1978, Givens was notified by the Board that he was entitled to receive spousal benefits under the Social Security Act by virtue of the decision in *Goldfarb,* but that because of the offset provision in Section 3(m) of the Railroad Retirement Act (45 U.S.C. 231b(m)), his railroad retirement annuity would be reduced by an equal amount. The Board did not add back a portion of this offset through the dual benefits provision in Section 3(h) of the Act. Givens appealed this denial of dual benefits, and by order dated November 10, 1981, the Board denied his claim on the ground that his eligibility for dual benefits had not been determined prior to August 13, 1981, the cut-off date under Section 3(h)(6) of the Act. The Board explained (Pet. App. A12-A13, B4):

> No determination as to his entitlement to a windfall dual benefit has been made in regard to Mr. Givens prior to the resolution of this appeal, either by the Board or by a court. *Gebbie* was not a class action, and therefore applied only to the three individuals involved in that case. Thus, in effect, section [3(h)(6)] preserves windfalls only for those individuals whose entitlement to such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie.

3. a. The court of appeals sustained the Board's denial of dual benefits to petitioner Givens.[1] The court first rejected the contention that the Board was required to follow the Seventh Circuit's decision in *Gebbie* in its nationwide administration of the Railroad Retirement Act. The court observed that "the *dispositive* effect of *Gebbie* was clearly limited to the three petitioners involved in that case," because the *Gebbie* court had declined to certify the case as a class action on the ground that it was " 'not an appropriate forum for such action' " (Pet. App. A14, quoting *Gebbie*, 631 F.2d at 516 n.9 (emphasis supplied by the court)). Moreover, the court noted that the Seventh Circuit itself had subsequently held that "*Gebbie* 'decided only the entitlement of the individual petitioner[s] in that case' " (Pet. App. A14, quoting *Frock* v. *United States Railroad*

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[1]There were four other individuals (the four other petitioners in this Court) who also sought review of the Board's denial of their applications for dual benefits. The court of appeals observed that only petitioner Givens was "clearly and properly before [the] court," because the cases of the others were "arguably flawed due to [their] failure * * * to exhaust their administrative remedies and/or file a timely appeal" (Pet. App. A3-A4 & n.1). The court did not resolve the question of its jurisdiction over the claims of the other petitioners, however, in view of its disposition on the merits with regard to Givens' claim (*ibid.*).

Retirement Board, 685 F.2d 1041, 1046 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983)).

The court of appeals further explained that *Gebbie* was the decision of only one circuit, and "although it must be given deference, it need not be taken by the Board as the law of the land" (Pet. App. A15). In this regard, the court noted that the Seventh Circuit in *Frock* had disavowed any role as the "ultimate decisionmaker" when it stated that "to conclude otherwise would be to make decisions of the Seventh Circuit binding on all other circuits 'simply because it was the first court presented with the issue' " (*ibid.*, quoting *Frock*, 685 F.2d at 1046). Accordingly, the court concluded, "until the appearance of more far-reaching precedent, the Board was free to continue to apply its interpretation of sections 3(h)(3) and 3(h)(4)" (Pet. App. A16). In addition, the court noted that Congress believed in 1981, when it enacted Section 3(h)(6) to eliminate the entitlement to windfall benefits for additional persons in the future, that the Board's interpretation, rather than that of the *Gebbie* court, was correct (Pet. App. A16-A18, quoting H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981)).

The court of appeals also rejected petitioner Givens' contention that the Board's failure to provide him with a favorable determination of entitlement prior to the August 13, 1981 deadline in Section 3(h)(6) violated the Due Process Clause of the Fifth Amendment (Pet. App. A18-A21). The court noted that the Railroad Retirement Act, unlike the statute involved in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), did not impose a deadline within which the Board was required to render a decision, and that there was no procedure or process that was denied Givens prior to the cut-off date Congress selected (Pet. App. A20). Finally, the court held that Section 3(h)(6) did not violate the equal protection component of the Due Process Clause by creating an irrational classification of those who would and

would not be eligible for benefits (Pet. App. A21-A24) or by perpetuating an impermissible gender-based classification (*id.* at A24-A26).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. This Court already has denied review of the Seventh Circuit's decision sustaining the validity of Section 3(h)(6) of the Railroad Retirement Act of 1974, *Frock* v. *United States Railroad Retirement Board,* 685 F.2d 1041 (1982), cert. denied, 459 U.S. 1201 (1983), and the Ninth Circuit also recently sustained the same provision. *Spraic* v. *United States Railroad Retirement Board,* No. 83-7908 (June 26, 1984). The decision below does not cause undue hardship or deprive anyone of benefits currently being received; Section 3(h)(6) merely prevents certain individuals from obtaining "dual" or "windfall" benefits in the future. Moreover, the issue presented is unlikely to be of much continuing importance, because Section 3(h)(6) plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981. Accordingly, further review by this Court is not warranted.

1. Petitioners first contend (Pet. 12-20) that the Seventh Circuit's decision in *Gebbie,* which involved only three claimants and which the Seventh Circuit specifically declined to certify as a class action, nevertheless "obligated the Board to determine entitlement for every other railroader using the same interpretation of [Section 3(h)(3)]." See Pet. 12. For this reason, they contend, the Board should have granted their applications for spousal windfall benefits prior to the August 13, 1981 cut-off date. But as the Ninth

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[2]Petitioner no longer challenges Section 3(h)(6) on the latter ground, and such a challenge would be without merit in any event in light of this Court's decision in *Heckler* v. *Mathews,* No. 82-1050 (Mar. 5, 1984).

Circuit observed, whether or not the Board, prior to the effective date of Section 3(h)(6) of the Act, should have adopted the interpretation given the windfall benefit provision by the Seventh Circuit in *Gebbie* is irrelevant to the validity of the statutory cut-off date that Congress enacted in Section 3(h)(6). This is so because "[t]he language and legislative history of the section show [that] it was intended to overrule *Gebbie* for all cases where, for whatever reason, the retiree had not yet been awarded dual benefits." *Spraic*, slip op. 2720.

In any event, petitioners' contention that the Board was required to review their claims under the interpretation given the Act by the Seventh Circuit in *Gebbie* is without merit. Petitioners state (Pet. 8) that they reside in Ohio, California, and New Jersey — not in any of the States comprising the Seventh Circuit. Their argument therefore is not that the Board must apply the decision of a court of appeals to the claims of all persons residing *within* that circuit. Petitioners instead make the far more sweeping submission that the Board was required to adopt the interpretation by a single court of appeals in *Gebbie* in the Board's nationwide administration of the Act.[3]

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[3]Thus, despite petitioners' inflammatory rhetoric about "nonacquiescence," this case is different from *Lopez* v. *Heckler*, 725 F.2d 1489, 1503 (9th Cir. 1984), petition for cert. pending, No. 84-115 (filed July 20, 1984), upon which petitioners rely (Pet. 15-16). There, the Ninth Circuit held that the Social Security Administration was constitutionally required to apply prior decisions of the Ninth Circuit when reviewing benefit claims filed by other individuals residing in that circuit. We believe the Ninth Circuit was clearly incorrect on this point. See *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984). But however that may be, the decision in *Lopez* did not purport to bind the Social Security Administration to apply a single appellate court ruling throughout the Nation, as petitioners urge here. See 725 F.2d at 1496-1497 & n.5; but see *Spraic*, slip op. 2720. *Kirkland* v. *United States Railroad Retirement Board*, 706 F.2d 99, 104 (2d Cir. 1983), upon

Petitioners base this broad argument on the judicial review provisions of the Act. Under 45 U.S.C. 355(f), as made applicable to the Railroad Retirement Act by 45 U.S.C. 231g, the claimant may obtain judicial review of a final decision of the Board in the United States Court of Appeals for any one of three circuits: the Seventh Circuit, the District of Columbia Circuit, or the circuit in which the claimant resides. Because of the Seventh Circuit's nationwide jurisdiction, petitioners argue that "[i]f *Gebbie* is not limited to the three individuals, it must be applied to everyone; there is no middle point" (Pet. 20 n.5). There is no indication, however, that by providing claimants with these alternative forums, Congress intended to give the decisions of the Seventh and District of Columbia Circuits binding effect throughout the United States, essentially indistinguishable from the effect of a nationwide class action or of a statute passed by Congress itself. Moreover, petitioners presumably would apply their argument only if the claimant prevailed in one of those two courts; if the Board prevailed in an action involving a single claimant, other claimants would not be bound. We cannot believe that Congress would have intended such an imbalance in the effect of an appellate ruling. Petitioners also fail to explain what would happen if the Seventh and District of Columbia Circuits — each with nationwide jurisdiction in railroad retirement matters — reached opposite conclusions on the same legal issue. These practical difficulties seriously undermine petitioners' novel submission.

In addition, the Seventh Circuit itself has rejected the notion that the Board was required to give the decision in *Gebbie* binding effect throughout the Nation, eschewing the

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which petitioners also rely (Pet. 18), likewise involved the application of prior appellate precedent within the same circuit. Hence, in adjudicating petitioners' claims for benefits, the Board was no more required to "acquiesce" in *Gebbie* than petitioners were obliged to "acquiesce" in *Frock*.

role of "ultimate decisionmaker" that petitioners seek to thrust upon it. *Frock,* 685 F.2d at 1046. And in this very case, the District of Columbia Circuit, the other court with nationwide jurisdiction in railroad retirement matters, has agreed with the Seventh Circuit's reasoning in *Frock* (Pet. App. A14-A16). Finally, as the court below observed, the legislative history of Section 3(h)(6) "makes it clear that Congress believed the Board's interpretation of [Sections] 3(h)(3) and 3(h)(4) to be correct" (Pet. App. A16), and it enacted Section 3(h)(6) for the purpose of ensuring that the Board's interpretation, not that in *Gebbie,* would be followed.[4] Congress thus was content (and apparently quite relieved) that the Board had not reflexively applied the result in *Gebbie* to the tens of thousands of other retirees who petitioners assert (Pet. 5) are similarly situated.

2. Petitioners next contend (Pet. 20-26) that they had a "vested" right to windfall benefits under Sections 3(h)(3) and 3(h)(4) of the Act as interpreted in *Gebbie,* and that Section 3(h)(6) violates the Due Process Clause under this Court's decision in *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982), because it validates the Board's refusal to award them windfall benefits prior to August 13, 1981. This argument is insubstantial.

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[4]See H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981):

> The Court in *Gebbie* reversed the Board's determination in the case, saying, in effect, that the Social Security Act "as in effect in 1974" should be interpreted in light of the 1977 decisions [in *Goldfarb* and related cases]. The House bill thus amended the law to make clear that the phrase "the Social Security Act as in effect on December 31, 1974" is intended to mean "the Social Security Act as it was in effect and being administered on December 31, 1974."

This Court's subsequent construction of a similar provision of the Social Security Act in *Mathews,* slip op. 12-14, is further evidence that the *Gebbie* decision was incorrect.

As an initial matter, as we have explained, the Board was not required to adopt the Seventh Circuit's statutory construction in *Gebbie*. Nor, contrary to petitioners' assertion, did they have a "vested" right to windfall benefits. "[R]ailroad benefits, like Social Security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 174. Indeed, this Court (citing *Fritz*) recognized as much in *Logan* v. *Zimmerman Brush Co.*, the very decision upon which petitioners rely. 455 U.S. at 432-433. When Congress does eliminate a substantive entitlement, "the legislative determination provides all the process that is due, see *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445-446 (1915)." 455 U.S. at 433. That is all that happened here. Congress eliminated the substantive right to spousal windfall benefits for a particular category of claimants: those who had not, by August 13, 1981, been affirmatively found in adjudicatory proceedings before the Board or in court to be entitled to them. Put another way, when Congress enacted a new rule of law to be applied by the Board with respect to all future applications for retirement benefits, it also elected to apply that new rule of law in all cases involving claims for spousal windfall benefits that were still pending on administrative or judicial review at the time of enactment and in which a final determination of entitlement therefore had not yet been made. Congress clearly had the authority to require the Board and the courts to apply a change in the law to cases that were pending before them. *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).

The Court's decision in *Logan* v. *Zimmerman Brush Co.*, upon which petitioners rely, involved entirely different circumstances. In *Logan*, an employee allegedly discharged because of a physical handicap filed a timely complaint of

discrimination with the Illinois Fair Employment Practices Commission, as he was required by state law to do, but the Commission failed to convene a factfinding conference within the period prescribed by statute. The Supreme Court of Illinois held that the Commission was accordingly deprived of jurisdiction to adjudicate the complaint and that the former employee was unable to obtain administrative or judicial review of his discrimination complaint. The Supreme Court of Illinois rejected the former employee's claim that his due process rights would be violated if the Commission's error were permitted, in effect, to extinguish his cause of action. This Court reversed, holding that the right to use the Commission's adjudicatory procedures was a species of property protected by the Due Process Clause and that the former employee had been denied an opportunity for an appropriate hearing on the merits of his complaint " 'at a meaningful time and in a meaningful manner' " (455 U.S. at 437, quoting *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965)).

Thus, in *Logan,* an individual's cause of action was extinguished for no valid reason, but simply because the state authorities had erred. *Logan* therefore involved a deprivation of a *procedural* opportunity to vindicate a substantive right that had not been altered by the legislature. Here, by contrast, Congress extinguished the substantive right itself, by phasing out dual benefits and choosing a date by which all previously filed claims for such benefits were required to have been determined in order to be given grandfather protection.[5]

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[5]In addition, here, unlike in *Logan* v. *Zimmerman Brush Co.,* the Board was not required to issue a decision within a particular time period that had elapsed before the August 13, 1981 cut-off date. In *Logan,* by contrast, the state agency was required to make a decision within 120 days (Pet. App. A19). The court of appeals in this case further concluded that the period of time that elapsed between Givens'

3. Finally, petitioners contend (Pet. 26-34) that Section 3(h)(6) violates the equal protection component of the Due Process Clause because it creates an irrational distinction between those for whom windfall benefits are preserved and those for whom they are not. This argument is without merit. As this Court held in *Fritz*, because Congress could have eliminated windfall benefits altogether, "it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out these benefits. The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way." 449 U.S. at 177. Plainly it did not.

The Court recently stressed, in sustaining another grandfather provision enacted in the wake of *Goldfarb*, that the protection of reasonable reliance interests provides an " 'exceedingly persuasive justification' " for the inevitable line drawing involved in fashioning a grandfather provision. *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 17, quoting *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981). Here, Congress rationally could determine that the reliance interests of persons who already were receiving windfall benefits under Section 3(h)(3) or (4) or had been determined to be entitled to receive them by the Board or a court were greater than those of individuals who had not yet been found to be entitled to such benefits. In other words, Congress "chose to recognize and protect 'expectations created by court decisions and Board actions. Consideration of such expectations is a legitimate concern of Congress.' " Pet. App. A23-A24, quoting *Frock*, 685 F.2d at 1047. See also *Spraic*, slip op. 2722. Congress's action also

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filing of his application and the Board's decision was not so unreasonable as to violate due process and that there was no evidence that the Board deliberately delayed the processing of his application (*id.* at A20-A21).

was consistent with the familiar practice of applying a change in the law to cases that are still pending before an agency or in court, even though administrative decisions or court decrees that have become final will not be reopened. See page 10, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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